

LEGISLATIVE CONSENT MEMORANDUM

Scotland Bill

Introduction

1. On 30 November 2010, the United Kingdom Government introduced a Scotland Bill in the House of Commons. As this is a relevant Bill under rule 9B.1.1 of the Parliament's Standing Orders, this memorandum has been lodged by Fiona Hyslop MSP in accordance with rule 9B.3.1(a). The Scottish Government has prepared this memorandum as the basis of the Parliament's scrutiny of the Bill and the accompanying paper *Strengthening Scotland's Future*. The Bill can be found at <http://services.parliament.uk/bills/2010-11/scotland.html> and the command paper at:

<http://www.official-documents.gov.uk/document/cm79/7973/7973.asp>

2. The main part of the UK Government's proposals concern the system of funding devolved government in Scotland, but the Bill also covers a range of other policy areas. The Scottish Government therefore supports the appointment of an ad hoc Committee to consider and report on this memorandum under rule 9B.3.5, and examine the Bill and *Strengthening Scotland's Future*, take evidence from the Scottish and UK Governments and interested parties, and to make recommendations to Parliament.

Summary of the Bill

3. In its Coalition Agreement of 20 May the incoming UK Government announced its intention to implement the proposals of the Commission on Scottish Devolution (the Calman Commission), which was set up following Scottish Parliamentary motion S3M-976 of 6 December 2007. The UK Government proposals have a legislative component – the Scotland Bill – and a non-legislative component – the accompanying paper *Strengthening Scotland's Future*. The Bill also contains matters not considered by the Commission. The UK Government does not intend to legislate on all the Commission's proposals that could have been included in the Bill, and the paper describes its approach to those. The paper also describes the UK Government's proposals for matters not requiring legislation.

4. This memorandum sets out the Scottish Government's approach to the UK Government's proposals, both legislative and non-legislative, and initial advice to Parliament. The Scottish Government will bring forward further detailed comment on the proposals for Parliament to consider during the scrutiny process. The UK Government has indicated that it looks to work with the Scottish Government and Scottish Parliament in scrutinising and developing the proposals, particularly the financial proposals. The Scottish Government will fully support that process.

5. Since the publication of the Commission's final report on 15 June 2009, the Scottish Government has supported early action on some of its recommendations, and has made reasoned criticism of others, proposing alternatives where appropriate. The Scottish Government will continue that approach to Parliament's scrutiny of the UK Government's proposals, noting that they differ from the Commission's recommendations. The Scottish Government's initial views on the detailed proposals are set out in the Annex to this memorandum. In general, the Government believes that

all the provisions in the Bill would benefit from detailed scrutiny by Parliament, and further development. The Government also believes that Parliament should consider whether some matters recommended by the Commission, but not currently in the Bill, should be included.

6. The Government supports a number of the proposals in the Bill and *Strengthening Scotland's Future*, such as the proposals on air weapons, drink-driving limits, and licensing to treat addiction. The Government does not support the proposals to reserve matters currently devolved to the Scottish Parliament: regulation of certain health professionals (those newly regulated since the Scotland Act) and aspects of the law of insolvency. The Annex also details improvements that could be made to the proposals to achieve the objectives of the Bill more effectively or to provide greater benefit to the people of Scotland. The Scottish Government is developing its advice to Parliament on a number of key issues, in particular the legislative provisions and the practical mechanisms for the proposed system of devolved finance. The Government regrets that the UK Government has not proposed in the Bill legislative measures to secure certain recommendations of the Commission: for example, to give Parliament a role in benefits policy; to devolve marine nature conservation; to provide a role for Scottish Ministers in directions to the Crown Estate Commission; and to devolve Air Passenger Duty and aggregates levy.

7. In its consideration of the Bill, the Government invites Parliament to consider the following issues in particular:

- The operation of the system of devolved finance: the detail of the legislative provisions on income tax, devolved taxes and borrowing, including the flexibility of the provisions to allow improvements and future developments; the mechanisms and agreements between the UK and Scottish Governments necessary to operate the system in practice; and the potential impact of the proposals on the overall size of the devolved Scottish budget in future years.
- The effectiveness of the provisions of the Bill that devolve further responsibilities to the Scottish Parliament and Scottish Ministers, and whether these could be amended to increase the benefits to the people of Scotland.
- The proposals to reserve matters currently devolved to the Scottish Parliament and whether there are any alternative routes that would achieve the objectives sought by the UK Government while respecting and preserving the Parliament's current competence.
- The effectiveness of the approaches proposed by the UK Government in *Strengthening Scotland's Future* for recommendations not in the Bill.
- Additional subjects Parliament might propose to the UK Government for inclusion in the Bill (such as responsibility for the dates of Scottish General Elections).
- The future role of Parliament in the Bill's proposals, for example consenting to the exercise of Treasury powers to make regulations, or commence the taxation provisions.

Reasons for seeking a legislative consent motion

8. The purpose of the Scotland Bill is to revise the devolution settlement and adjust the competence of the Parliament and the Scottish Government. The Scottish Government's view is that Bill as a whole requires the consent of the Parliament under

the Sewel Convention. The Parliament could refuse consent to any aspects of the Bill it does not support. Under the Convention, the UK Parliament would not proceed to consider those aspects of the Bill to which the Parliament did not consent. The Parliament could also propose changes to the Bill and withhold its consent unless suitable amendments to the Bill are made by the UK Parliament or suitable undertakings offered by the UK Government.

Consultation

9. The Memorandum of Understanding (MoU) between the UK Government and the devolved administrations commits all four administrations to “the principle of good communications ... especially where one administration’s work may have some bearing upon the responsibilities of another administration”. The underlying objective is to ensure that respective administrations “make representations to each other in sufficient time for those representations to be fully considered”. These principles are further expressed in the UK Government’s own Devolution Guidance Note 10 (DGN10) which requires that there should be prior consultation with the Scottish Government on UK Bills with provisions requiring the consent of the Parliament. The guidance requires that devolution-related issues are substantively resolved before the Bill is introduced by the UK Government.

10. There has been contact between the Scottish and UK Governments, at Ministerial and official level, over a number of months. However, the Scottish Government does not believe that the process of consultation was satisfactorily completed before the Bill was introduced by the UK Government. The procedures in the MoU and DGN10 are intended to provide a stable basis for inter-governmental dialogue and represent important safeguards for the interests and responsibilities of both the Scottish Government and the Scottish Parliament. The Scottish Government believes they should be respected before legislation is introduced by the UK Government, particularly for a Bill of this nature.

11. There has been no public consultation on the Bill by the UK Government. The technical aspects of collecting and enforcing the financial aspects have been discussed by the UK Government with selected stakeholders in confidence. Scottish Government officials attended two of these meetings as observers.

Financial Implications

12. The Bill’s most significant financial implications flow from the proposals to reform the financing of devolved government in Scotland. The financial implications are twofold. First, and most significant, will be the impact of replacing part of the block grant with the revenue raised from a new Scottish rate of income tax. The proposals have the potential to impose significant cuts on Scotland’s budget. Had this system been introduced in 1999, the Scottish budget would have been lower than under the Barnett formula in every year from 2001-02 to 2010-11. Since devolution, between 1999-00 and 2010-11, the total cumulative real terms shortfall would have been £8 billion.

13. The second financial implication is the cost of implementing the changes to the financial system. Under the UK Government’s Statement of Funding Policy, the costs flowing from decisions taken by the UK Government fall on the UK Government, no matter which administration actually has to meet these costs; and the costs flowing from decisions taken by the Scottish Government fall on the budget available to the Scottish

Government. The UK Government claim that the costs of implementing the Scotland Bill would, however, be costs of operating devolution and should fall on existing Scottish budgets. In support of that, the UK Government refers to the precedent of the Scottish Variable Rate (SVR), for which the then Scottish Executive met significant start up costs in the years to 2001-02. There are important differences between the SVR and the Bill's proposals, not least that use of the SVR was optional whereas the Scottish Parliament would have to set and collect a Scottish rate of income tax. The Scotland Act also had to make specific provision to enable Scottish Ministers to pay for the system, a provision the Scotland Bill replicates. The UK Government's position also raises important points of principle about the funding of increased devolution to Scotland.

14. The Parliament will also want to note that the UK Government's comments on the costs of setting up, implementing and operating the new Scottish rate of income tax, only cover some of the costs likely to fall on the existing Scottish Budget under the UK Government's proposals. The Scottish Government is not in a position to provide a more detailed assessment of these costs and risks because the relevant IT and administrative systems are the responsibility of HM Revenue and Customs (HMRC).

15. The Government invites Parliament to examine the financial implications of the UK Government's proposals, both in terms of its implications for the overall level of funding, and for potential costs for implementation.

Legislative Consent Motion

16. Under Standing Orders Rule 9B.3.3 a member lodging a legislative consent memorandum is required to include a draft legislative consent motion or, in the case of memorandum lodged by the Scottish Government, to explain why it does not intend to bring forward such a motion. The Parliament is now undertaking detailed scrutiny of the proposals and that consideration will inform the final Legislative Consent Motion lodged by the Government in due course and covering all aspects of the Bill, both financial and non-financial, requiring the Parliament's consent. In the meantime the Government provides the following draft motion to illustrate its initial analysis in this memorandum:

That the Parliament agrees that the relevant provisions of the Scotland Bill, introduced in the House of Commons on 30 November 2010, relating to air weapons, the misuse of drugs, drink-driving limits, speed limits, Scottish tax on land transactions, and Scottish tax on disposal to landfill, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

Scottish Government

1 December 2010

ANNEX A

THE SCOTLAND BILL

Part 1 – The Parliament and its powers

The Scottish Parliament

Section 1 - 3 Scottish Parliamentary elections

Under Section 12 of the Scotland Act 1998, the Secretary of State for Scotland has the power to make rules relating to the conduct of elections to the Scottish Parliament, the process for challenging such an election, and the return of members other than at an election. The Scottish Parliament and Ministers currently have no legislative or administrative competence in this area. The Commission on Scottish Devolution recommended that the UK Government transfer responsibility to Scottish Ministers for those functions that “relate to the administration of the Scottish Parliament elections which are currently held by the Secretary of State for Scotland”. These sections of the Bill would give Scottish Ministers responsibility for certain of these administrative functions relating to Scottish Parliament elections.

While the Scottish Government welcomes the devolution of the administration of Scottish Parliament elections, it has consistently argued that full legislative as well as administrative responsibility for the elections should be devolved. The Gould report into the 2007 elections supported this view, and the Scottish Parliament has also expressed its support for moves to transfer full responsibility. On 10 January 2008 Parliament welcomed the Gould Report and endorsed the Gould recommendation calling for “full devolution of executive and legislative powers to the Scottish Government and Parliament for the administration of its own elections” (S3M-1110). The Local Government and Communities Committee also endorsed the resolution of the Scottish Parliament in relation to the Gould Report.

The Bill would result in an improvement to the current position, by devolution of certain (but not all) administrative arrangements. That offers Scottish Ministers the opportunity to make rules of conduct for elections, but they would need to approach the UK Government if primary legislation was needed, for example in relation to the date of elections or the voting system used. The Scottish Parliament’s role would be limited to approving or disapproving the rules made by Scottish Ministers; it would have no opportunity to shape the parameters for those rules through its own primary legislation. The Bill also requires that Scottish Ministers must consult the Secretary of State before making the rules.

The Gould report was clear that fragmentation of responsibility was a key issue in the problems highlighted in the 2007 elections. Under the proposals, there would be further fragmentation, with the Secretary of State retaining a number of responsibilities including voter registration, rules about the composition of Parliament, the procedure for filling any regional seat vacancy during the life of a Parliament and rules relating to disqualification. These areas would be covered by separate Scottish Parliament Rules to be made by the Secretary of State. However, there would be no requirement for the Secretary of State to consult Scottish Ministers about these rules (in contrast to the equivalent requirement placed on Scottish Ministers). Full devolution would reflect the spirit of the Gould Report and allow the Scottish Parliament and Ministers to work with

electoral professionals in Scotland to ensure that the problems highlighted by that report do not happen again.

The Scottish Government supports the devolution of the administration of elections to the Scottish Parliament, and welcomes the suggestion that the UK Government will consider a review of the electoral system after the 2011 elections to the Scottish Parliament, taking into account the views of the new Scottish Parliament. However, the Scottish Government does not consider that the UK Government's current policy for a simple transfer of Ministerial powers addresses the position satisfactorily. The Government invites the Parliament to consider the case for devolution of legislative competence over the administration of elections, and to examine the detail of the proposed division of responsibilities between Scottish and UK Ministers.

Section 4 Presiding Officer and deputies

Section 4 would change the requirement that Parliament must appoint a Presiding Officer and deputies at the first meeting of a new session, and enables additional deputies to be appointed if deemed appropriate (under current arrangements only two deputies may be appointed).

The Scottish Government supports this proposal, which would enact the proposals of the Commission on Scottish Devolution and the Standards, Procedures and Public Appointments Committee, whose *Report on the recommendations of the Commission on Scottish Devolution regarding Scottish Parliament procedures*, published on 24 September, was endorsed by Parliament on 29 September 2010.

Section 5 Scottish Parliamentary Corporate Body

Section 5 would amend section 21(2)(b) of the Scotland Act 1998 to require that the Scottish Parliamentary Corporate Body (SPCB) comprises (in addition to the Presiding Officer) at least four MSPs as opposed to the current requirement for only four MSPs to be appointed.

This was recommended in Part 6 of the Commission's report, where it was suggested that section 21(2), in terms of representing a fixed point for the Parliament in relation to its internal arrangements, might be reviewed. This is consistent with the general policy approach in Part 6 of the report, which is to maintain the constitutional integrity of the 1998 Act, but to offer the Parliament more flexibility in its own operations.

The SPPA Committee supported amendment of section 21 on the basis that restriction to four members might not always reflect the number of major political parties represented in the Parliament (this appears to have been the basis for the number enshrined in the 1998 Act). It also suggested that a ceiling limit might be set.

Section 5 is therefore consistent with the Commission's approach, in preserving a minimum number of members of the SPCB, but leaving it open to the Parliament to appoint further members if it sees fit. No provision is made for a ceiling limit, but that would go against the general policy of removing any unnecessary restriction on the Parliament's operations.

The Scottish Government considers this to be a welcome move, not only in terms of the potential administrative benefits it offers to the Parliament (contributing to good

governance in Scotland), but, more generally, because it confers more responsibility on the Parliament.

Section 6 Bills: statements as to legislative competence

Section 6 requires any person introducing a Bill in the Parliament to make a statement that it is (in that person's opinion) within the Parliament's legislative competence. Currently only Ministers have to make such a statement when introducing a Bill. Although the Scottish Government considers this provision to be unnecessary, it does not oppose it, and the provision would deliver the proposals of the Commission and the SPPA Committee, as endorsed by Parliament.

Section 7 Partial suspension of Acts subject to scrutiny by Supreme Court

This provision did not result from a recommendation of the Commission.

Under section 33 of the Scotland Act the UK and Scottish Law Officers are able to refer a Scottish Parliament Bill to the Supreme Court for decision on whether it is within legislative competence. The Presiding Officer may not submit the Bill for Royal Assent until this has been resolved.

This is only one of the mechanisms in the Scotland Act to ensure that any legislation passed by the Scottish Parliament is within its competence. The others are:

- Section 101 of the Act, which ensures that any provision in an Act of the Scottish Parliament (asp) which could be read in such a way as to be outside competence, is to be read as narrowly as is required for it to be within competence, and to have effect accordingly. The purpose of the section is to enable the courts to give effect to such legislation wherever possible, rather than to invalidate it.
- Section 107, which enables provision to be made by subordinate legislation to remedy a provision of an Act of the Scottish Parliament or an exercise of a function, which is, or is suspected to be, outwith competence.

The proposed provision would amend this process to enable single provisions to be identified for Supreme Court consideration without affecting the remainder of the Bill. The Bill could be submitted for Royal Assent by the Presiding Officer, but the disputed provisions would not come into force until the Supreme Court had reached a decision. Additionally, the Court would have the power to commence affected provisions, in addition to Scottish Ministers, whatever the commencement arrangements specified in the Bill. This is a significant departure from normal practice. Given that commencement would presumably only occur where the Court had found the provisions to be within competence, it is unclear why the UK Government proposes the Court should have this power.

Reference of part of a Bill on competence grounds may result in a significant part of the Bill being unworkable until the court reaches a view. A Bill sent for Royal Assent which cannot be fully commenced may end up being incapable of implementation at all. Doubt over the status of a Bill or of the validity of provisions within a Bill may give rise to a lack of legal certainty about its effect.

The provision would shift the constitutional and political balance in the current arrangements. Under the existing mechanism, a decision by a Law Officer to refer a bill is a very significant step, as the bill as a whole is blocked, in conflict with the wishes of the Scottish Parliament. Under the new mechanism, the Presiding Officer would need to decide whether to submit a disputed bill for Royal Assent, possibly inviting the Queen to give Royal Assent to a bill containing disputed provisions, which would be arguably undesirable. In practice, the effect of the provision might be that Parliament is forced to reconsider bills in circumstances that would not currently merit a reference by the Law Officers.. The proposed changes appear to be unnecessary in light of the other mechanisms that already exist in the Act.

There has been no consultation on this provision. The Scottish Government considers that there are strong arguments against it, as laid out above and invites Parliament to examine the purpose of, the need for and the likely effect of this proposal in more detail.

Section 8 Members' Interests

Section 8 would enable the Scottish Parliament to determine arrangements for the Members' interests arrangements. The Scottish Government considers Members' interests arrangements to be a matter for Parliament itself.

Section 9 Constituencies, regions and regional members

This provision did not result from a recommendation of the Commission.

The Political Parties, Elections and Referendums Act 2000 (PPERA) included a provision which gave Scottish Ministers the power to transfer certain functions of the Boundary Commission for Scotland to the Electoral Commission. This provision was commenced but the power was never used.

The Scottish Parliament (Constituencies) Act 2004 contained (at Section 1 (2) and (3) and Schedule 2) provisions to deal, if necessary, with relevant issues in the period before the functions of the Boundary Commission for Scotland were transferred to the Electoral Commission.

In January 2007 the Committee for Standards in Public Life recommended that the Electoral Commission should no longer have any involvement in electoral boundary matters and the provisions in PERPA to allow the transfer of boundary setting functions to the Commission should be repealed.

The relevant PERPA provisions were repealed in the Local Democracy, Economic Development and Construction Act 2009.

Section 9 (Constituencies, Regions and Regional Members) of the Scotland Bill therefore removes the now redundant provisions in the Scottish Parliament (Constituencies) Act 2004 referred to above.

The Scottish Government supports this provision.

Legislative competence

Section 10 Continued effect of provisions where legislative competence conferred for a limited period (“Reverse Sewel”)

Section 10 would expand upon the existing statutory mechanism (section 30 of Scotland Act 1998) for transferring legislative competence. It would clarify the effect of a time limited (“sunsetting”) order made under section 30. Where such an order is made, it provides that any provision of an Act of the Scottish Parliament which will be within the legislative competence of the Parliament by virtue of the modification is to continue to have effect after the modification ceases to have effect. It also provides that such orders, when they cease to have effect, would not limit sections 113(4) or (5) of the Scotland Act (dealing with the scope of powers to make subordinate legislation).

This section likely arises from the practical experience of the order made under section 30 in consequence of the *Somerville* case. While the proposal would address those circumstances, the Government believes that would generally be preferable for orders made under section 30 of the Scotland Act 1998 to transfer legislative competence to the Parliament on a permanent basis. The Government invites Parliament to consider the implications of the proposal as part of its scrutiny of the Bill.

Section 11 Air weapons

Firearms is currently a reserved matter. Section 11 would amend section B4 of the Scotland Act to create a specific exception to the reservation of firearms for the regulation of air weapons in order to give the Scottish Parliament legislative competence in this area. This is consistent with a recommendation made by the Commission. The proposed exception would apply to air rifles, air guns or air pistols which do not fall within section 5(1) of the Firearms Act 1968 and which are not of a type declared by rules made by the Secretary of State under section 53 of the 1968 Act to be specially dangerous. This mirrors the definition of an air weapon that can be found at section 1(3)(b) of the 1968 Act.

Aside from the proposal to except the regulation of air weapons from the reservation, the policy intention is for the subject matter of the existing framework of legislation relating to firearms (i.e. the Firearms Acts 1968 to 1997) to remain reserved in all other respects in terms of section B4.

The provision includes a power for the Secretary of State to designate “specially dangerous” air weapons, which would fall under the reserved regime that applies to other firearms. Exercise of this power would effectively adjust the boundary of reserved and devolved competence. Normally such adjustments are made under the Scotland Act, or by primary legislation subject to the Sewel Convention. In this case, the power would lie with UK Government Ministers and would not be subject to any procedure in the Parliament. The Scottish Government has therefore proposed that the relevant power should be only be exercised with the consent of the Scottish Parliament.

Although the Scottish Government considers that firearms legislation as a whole needs to be reviewed, and will continue to press for the responsibility for firearms legislation to be passed to the Scottish Parliament in its entirety, the Scottish Government supports the provision, subject to consideration of the point above.

Section 12 Insolvency

Corporate insolvency law is partly reserved and partly devolved. Under the Scotland Act, the general legal effect of liquidation is a reserved matter, but the process and effects of liquidation are devolved. Administration is also reserved, while receivership is devolved..

The final report of the Commission on Scottish Devolution recommended that the UK Insolvency Service, with appropriate input from the relevant department of the Scottish Government, should be made responsible for laying down the rules to be applied by insolvency practitioners on both sides of the border. The Commission concluded that this might be achieved without altering devolved legislative competence through UK legislation with consent from Scottish Parliament under the Sewel Convention. However, the draft provisions in the Scotland Bill would reserve competence for all aspects of company liquidation to Westminster, whilst maintaining the devolution of company receivership to the Scottish Government.

The Government believes that improved inter-Governmental working is the correct way to address circumstances in which devolved and reserved administrations working together can bring benefits to the people of Scotland and beyond. The Government believes that it is wrong as a matter of principle to address such circumstances through reserving matters to the UK Government and Parliament. The argument of efficiency and consistency made in the case of insolvency can be made across a range of devolved activities. The Government believes that Parliament should not accept that its competence, and democratic accountability in Scotland, should be reduced except in the most compelling of circumstances.

The Scottish Government believes that the arguments for reserving this specific competence are weak. As these matters are so integrated into court procedures and Scottish private law, especially diligence, it is better that they are dealt with on a devolved basis. The Government considers that the programme of modernisation already underway within the Government, with appropriate dialogue with the UK Insolvency Service would result in a satisfactory outcome without disturbing the current devolved responsibilities. This would allow a position that brought about a consistency of approach, yet recognised the important differences in the legal framework of Scotland.

Corporate insolvency procedures can have significant economic effects and the Scottish Government therefore supports full devolution of the power to legislate about the grounds for insolvency and its effects as well as the procedures. The Government sees no reason why Northern Ireland should have more autonomy to deal with these issues than Scotland. In his evidence to the Calman Commission, Professor George Gretton, Scottish Law Commissioner and insolvency expert, made these points.

On the detail of the provisions, the Scottish Government notes that the provisions would reserve responsibility for insolvency Registered Social Landlords, for which the Scottish Parliament had particular responsibility, recently exercised in the Housing (Scotland) Bill 2010.

The Scottish Government opposes to the reservation of these responsibilities to the United Kingdom, and invites the Parliament to consider alternative approaches to the issues identified by the Commission.

Section 13 Regulation of health professions

Section 13 would reserve the regulation of all health professions.

The current position under the Scotland Act is that the regulation of the health professions which were regulated when the Scotland Act came into force is reserved to the UK Parliament. The regulation of the health professions which have been regulated since then (such as operating department practitioners, dental nurses, dental technicians, clinical dental technicians, orthodontic therapists, pharmacy technicians and practitioner psychologists) is devolved to the Scottish Parliament, as is the regulation of any health professions which are regulated in the future

The Government believes that improved inter-Governmental working is the correct way to address circumstances in which devolved and reserved administrations working together can bring benefits to the people of Scotland and beyond. The Government believes that it is wrong as a matter of principle to address such circumstances through reserving matters to the UK Government and Parliament. The argument of consistency made in the case of regulation of health professionals can be made across a range of devolved activities. The Government believes that Parliament should not accept that its competence, and democratic accountability in Scotland, should be reduced except in the most compelling of circumstances.

The Scottish Government does not support the policy intention of this proposal. Health is almost entirely devolved to the Scottish Parliament under the Scotland Act. The health service in Scotland has developed separately from those elsewhere in the United Kingdom, and Scottish Ministers are accountable to the Scottish Parliament, and through them to the people of Scotland, for the design and delivery of health services. Against that background, any proposal to remove responsibility for a health matter from Scotland, and transfer it to the United Kingdom Government, is anomalous.

There is widespread public interest, as well as that of stakeholders such as the health unions, in ensuring Scotland's particular needs and circumstances are taken into account in decisions made about the health service in Scotland, including regulation. The current legislative framework provides for this, through the section 60 Order route with its role for the Scottish Parliament. There are a number of specific examples of how devolution has already ensured that the current regulation process takes account of Scottish interests in developing regulation across the United Kingdom, for example for practitioner psychologists and certain dental care professionals.

In relation to the regulation of the healthcare professions, the Commission concluded:

5.147 The Commission believes that it is important that there should be a common approach to regulation of the health professions to ensure that there is clarity for patients as well as an assurance of common standards irrespective of the location in which they find themselves in need of care or advice. Similarly, for practitioners, a consistent approach to regulation helps to ensure that mobility across Great Britain is straightforward and that relevant continuing professional development is recognised.

The mechanisms currently in place for regulation achieve the objectives identified by the

Commission. Despite different responsibilities for regulation across the United Kingdom, all four administrations have worked together to ensure a common framework across the UK for the regulation of new groups, and to implement the policies set out in the 2007 White Paper *Trust, Assurance and Safety*. Considerable progress has been made towards more robust, improved regulatory systems which apply consistently across the UK, but are sensitive to each country's needs, facilitating cross border movement of staff and aiding public understanding.

Over the last few years officials across all four administrations have also established and maintained positive relationships with each other and with all their stakeholders, successfully working together in various UK working groups, to their mutual benefit, considering future alternatives to statutory regulation that are not only proportionate to the risks posed by particular groups but also more cost effective. Scotland has led on areas of commissioning and piloting that have produced robust results that have better informed the evidence base for regulatory policy, to the benefit of all four UK administrations (see, for examples of these, the evidence of the Royal College of Surgeons of Edinburgh to the Commission).

The devolved element of regulation has led to an annual regulatory event in each of the last three years, allowing direct engagement with all stakeholders. It helps to keep the regulators up to date about significant policy developments in Scotland, such as the current Quality Agenda. Over the last few years the Scottish dimension has clearly been recognised by the healthcare regulators, with the General Medical Council, the General Dental Council and the Health Professions Council all now having a presence in Scotland, and the Nursing and Midwifery Council now actively considering this.

The evidence quoted by the Commission in support of its recommendation was from two Royal Colleges whose concerns focused on the regulation of doctors, which is entirely reserved. Neither called for changes to the arrangements for the regulation of other health professions. The UK Department of Health's evidence to the Commission concluded:

DH is not seeking any change to the reservation of the health professions in the Scotland Act 1998. In practice, both the Government and the devolved administration have always sought to apply a UK-wide framework to the regulation of the health professions, despite the fact the devolved competence exists for some professions. By working together, we have been able to manage the complications and additional work inherent in the settlement. To seek total reservation in this area would be unnecessary, when pragmatic, shared solutions are available.

The Government shares that conclusion, and strongly supports the view that the current arrangements support increased dialogue, and the sharing of ideas and views in reserved as well as devolved areas. Current work on medical revalidation across the UK is an example of how the implementation of regulatory systems sometimes has to be carried out in different ways in each country to reflect devolved and increasingly divergent NHS systems.

In summary, the Government believes that the current system ensures proper UK wide regulation, sensitive to local needs. The Government therefore invites the Parliament to examine the evidence for this provision, and make recommendations that maintain and respect the role of the Parliament in this regard.

Section 14 Antarctica

This provision did not result from a recommendation of the Commission.

It has emerged that the regulation of activities in Antarctica was not reserved under the Scotland Act 1998. The Scottish Government agrees that the UK Government should retain responsibility for regulation of activities in Antarctica. While the Scottish Government – as a matter of principle - opposes reservation of responsibilities currently within the competence of the Scottish Parliament, the devolved function has never been exercised. The Scottish Government does not, therefore, oppose the provision.

Part 2 – Ministers and their powers

The Scottish Ministers

Section 15 The Scottish Government

The provision would replace title “the Scottish Executive” with “the Scottish Government” in the Scotland Act.

The Scottish Government welcomes and supports this proposal.

Section 16 Time limit for human rights actions against Scottish Ministers etc

This provision did not result from a recommendation of the Commission.

Section 16 would make equivalent provision to the Convention Rights Proceedings (Amendment) (Scotland) Act. The Act, which was passed in response to the *Somerville* case, amends the Scotland Act to create a statutory time limit for bringing proceedings under that Act alleging a breach of Convention rights by the Scottish Ministers or a member of the Scottish Executive. This ensures that the same time limit applies regardless of whether proceedings are brought under the Scotland Act or the Human Rights Act 1998. The proposal now being made is to repeal the section 30 order and the amendment to legislative competence which enabled the Scottish Parliament to introduce the Act, and to instead make equivalent provision in the Scotland Bill. Action along these lines had previously been agreed between the Scottish and UK Governments. Equivalent provisions were included in the Constitutional Reform and Governance (CRAG) Bill in the last UK Parliament, but were removed from the Bill before dissolution.

By removing competence from the Scottish Parliament, the provisions restore the status quo which existed prior to the section 30 order made in 2009. As a consequence the Scottish Parliament would no longer be able to legislate in relation to time limits for human rights claims. However, the extent of that power is limited, and when competence was conceded by the UK Government it was on a temporary basis, on the full understanding that it would subsequently be recovered. The provision in the Scotland Act will maintain the effect of the Conventions Rights Proceedings Act.

There remain grounds for concern with these provisions which Parliament might consider. First, as provision has already been included in the Scotland Act by section 30 order, these proposals are unnecessary. Second, Wales and Northern Ireland faced similar exposure to human rights claims, and the CRAG Bill sought to address the issue for the UK as a whole. As it would be inappropriate to make provision in the Scotland Bill, the other devolved administrations will remain exposed as a consequence.

However, given the previous understandings between the UK and Scottish Governments, the Government does not oppose the proposal.

Executive competence

Section 17 BBC Trust member for Scotland

Members of the BBC Trust are appointed by Queen in Council, on advice by UK Ministers following an open selection process. Section 17 requires UK Ministers to act jointly with the Scottish Ministers in appointing the Member for Scotland or designating an existing Trust member as the Member for Scotland. However, UK Ministers would be able to act unilaterally in removing the Member for Scotland. The stated UK Government intention is that Scottish Ministers will be involved in all steps in the appointment process – deciding selection criteria and advertising; shortlisting for interview; interviewing and deciding on a preferred candidate. UK Ministers will retain oversight of the process. However, no decisions will be made in the process without the agreement of the Scottish Ministers.

Although granting Scottish Ministers the power of veto (by requiring their consent), the decision on appointments will remain with the UK Government. The provision does not, therefore, implement the recommendation of the Commission:

The responsibility for the appointment of the Scottish member of the BBC Trust should be exercised by Scottish Ministers, subject to the normal public appointments process.

The Scottish Government supported this recommendation, which followed a recommendation of the Scottish Broadcasting Commission, endorsed unanimously by the Scottish Parliament (S3M-02671).

In *Strengthening Scotland's Future* the UK Government argues this is the most appropriate outcome, as the appointment is primarily that of a member of a UK body, the BBC Trust, and broadcasting remains a reserved matter. The Scottish Government does not believe that it is essential for all members of UK bodies to be appointed by UK Government Ministers. It should be possible for UK bodies to operate effectively, and with a common purpose, when different members have been appointed by different Ministers. This argument was not made by the previous UK Government in its white paper *Scotland's Future in the United Kingdom*, published in November 2009. Until the UK Government's new position emerged, this recommendation had been the subject of consensus rather than controversy.

The Scottish Government is also of the view that it would be desirable to use the Scotland Bill to implement the Scottish Broadcasting Commission's recommendation that Scottish Ministers approve the appointment of MG ALBA's board members. It is difficult to characterise MG ALBA as a UK body, and it is already funded by Scottish Ministers. The objection now raised in relation to changing the accountability arrangements for BBC Trust appointments would therefore not appear to apply.

The Government invites the Parliament to consider the argument raised by the UK Government against Scottish Ministers exercising the function recommended by both the Commission on Scottish Devolution and the Scottish Broadcasting Commission. The Government also invites the Parliament to consider recommending further involvement of devolved Scottish institutions in broadcasting in Scotland, as described above.

Section 18 Scottish Crown Estate Commissioner

The Commission's final report made two recommendations in relation to the Crown Estate: that the appointment of a Scottish Crown Estate Commissioner should be made in formal consultation with Scottish Ministers; and that the Secretary of State for Scotland should, in consultation with Scottish Ministers, more actively exercise his powers of direction under the Crown Estate Act 1961. The Commission also recommended that there be consultation with Scottish Ministers to determine whether there is a need for direction immediately, and on a regular basis thereafter. Both recommendations were modest in terms of tackling the wider issues of accountability and transparency of the Crown Estate Commissioners in Scotland. The Scottish Government has recently published a consultation paper *Securing the Benefits from Scotland's Next Energy Revolution* which includes proposals for substantial change in the administration of the Crown Estate in Scotland, including direct economic benefit to Scotland from the exploitation of marine renewable resources.

Section 18 indicates the UK Government only plans to legislate on one of the recommendations: the involvement of Scottish Ministers in the appointment of a Scottish Crown Estate Commissioner. The impact of this in Scotland is likely to be negligible. The Commission acknowledged that the administration of the Crown Estate in Scotland is not sufficiently attuned to Scottish interest. The Bill presents an opportunity to address the fundamental issue identified by the Commission of the need for the Crown Estate Commissioners, in conducting their business, to have due regard to Scottish interests and the wider context in which they operate in Scotland. The Bill could deliver real improvements to the accountability and management of the Crown Estate in Scotland. This could be achieved in a range of ways, for example by introducing a statutory role for Scottish Ministers in the exercise of powers of direction (either a requirement for Secretary of State to consult or to seek agreement); or by the transfer of the power of direction from the Secretary of State for Scotland to Scottish Ministers.

Strengthening Scotland's Future acknowledges there is an understanding that Scottish interests will be represented in the composition of the Crown Estate Commissioners, and a Scottish Commissioner is in practice already appointed to the Crown Estate Commissioners. The key change arising from the recommendation is the requirement to consult Scottish Ministers on the appointment.

Strengthening Scotland's Future fails to describe the full recommendations of the Commission in regard to the power of direction. The Commission's focus was on the need for the Crown Estate Commissioner to have more regard to Scottish interests, hence the suggestion that the Secretary of State for Scotland more actively exercise the powers of direction, with an additional requirement for formal consultation with Scottish Ministers in doing so. The Commission also recommended that there be consultation with Scottish Ministers to determine whether there is a need for direction immediately, and on a regular basis thereafter. *Strengthening Scotland's Future* does not make clear that the UK Government has not formally consulted Scottish Ministers in determining there is no need for an immediate direction. This section of *Strengthening Scotland's Future* is therefore an incomplete statement of this aspect of the Commission's recommendations and the UK Government's response to them.

The Government invites Parliament to consider the purpose of the Commission's recommendations on the Crown Estate and whether the legislative proposals in the Bill

and the approach in *Strengthening Scotland's Future* adequately respond to those concerns. In particular, the Government invites Parliament to consider whether the requirement to consult Scottish Ministers on the power of direction should be set out in statute. Parliament will note that in deciding not to exercise such powers immediately the UK Government has not consulted Scottish Ministers. Such a legislative requirement would ensure that the UK Government would do so in future. The Government also invites Parliament to consider whether further reforms to the management of the Crown Estate to take account of Scottish interests, as detailed above, should be included in the Bill.

Section 19 Misuse of Drugs

Licensing to treat addiction is currently reserved to UK Ministers. Section 19 would transfer to Scottish Ministers the authority for regulating licenses for doctors practising in Scotland obtaining those licences in connection with patients being treated in Scotland, in line with a recommendation in the Commission's final report.

The Scottish Government supports the policy intention of this proposal. The Government has sought reassurance from the UK Government that, in line with paragraph 3.2.8 of the Statement of Funding Principles, any additional costs falling on the Scottish Government from this transfer of responsibilities would be met by the UK Government.

Section 20 Power to prescribe drink-driving limits

Under the Road Traffic Act 1988, the Secretary of State for Transport has regulatory powers over the prescribing of drink-driving limits. The subject matter of the Road Traffic Act – including this power over drink-driving limits – is generally reserved by the Scotland Act 1998. Section 20 would give Scottish Ministers the power to prescribe a drink-driving limit for offences committed in Scotland, in line with a recommendation made by the Commission in its final report. Under the provision, any order will be subject to the affirmative procedure in the Scottish Parliament.

The Scottish Government supports the proposal to devolve responsibility for the drink-driving limit to Scottish Ministers. However, the provisions contained in the Bill would not provide the additional powers on drink-driving that the Scottish Government proposed. For example, the Government supports legislative flexibility to prescribe differential drink-driving limits, and legislation to enable the police to conduct breath tests at any time, anywhere (as recommended by the North Review of Drink and Drug Driving 2009).

The Scottish Government supports the current proposals as a step toward the wider responsibilities described above.

Section 21 and 22 Speed limits

Legislation relating to speed limits is currently reserved, although certain functions are delegated to Scottish Ministers. The national speed limits (30 mph generally in built-up areas; 60 mph on single carriageway rural roads; and 70 mph on dual carriageways and motorways) are set by the UK Government. Local authorities have the power to set lower speed limits on local roads in their areas on a road by road basis and Scottish

Ministers have the power to set lower speed limits on trunk roads, also on a road by road basis.

These sections would transfer responsibility to set certain national speed limits on roads in Scotland to the Scottish Ministers. This proposal implements part of the Commission's recommendation that the power to determine the level of the national speed limit in Scotland should be devolved. It would devolve the following powers:

- to set the national speed limit on special roads, which includes changing the current 70 mph on all motorways;
- to set the national speed limit on all other roads (except the 30 mph limit on restricted roads), which includes the current 70 mph on all dual carriageways and the current 60 mph on all single carriageways; and
- to specify the traffic signage to be used for the Scottish national speed limit.

However, the provision does not allow the Scottish Ministers to change the national speed limit for particular classes of vehicle, such as commercial vehicles or cars towing caravans. The omission of the ability to set the maximum speed limits for different classes of vehicle seems anomalous, particularly as the main evidence given to the Commission on this subject was from the Road Haulage Association Scotland. There was no indication in the Commission's report that it intended its recommendation to be restricted in this way. The clause therefore leaves in place the current complex patchwork of responsibility for speed limits in Scotland, depending on the type of road and vehicle, which the Bill could otherwise have rationalised through a more comprehensive package of Scottish powers.

Furthermore the powers allow Scottish Ministers to specify the signage for any new national speed limit in Scotland through regulations but the Scottish Ministers can only make those regulations with the agreement of the Secretary of State. This raises significant question marks over the extent to which Scottish Ministers could in practice make use of these new powers.

While the Government supports the provision as far as it goes, it therefore invites the Parliament to consider whether the provisions should be adjusted (i) to devolve responsibility for the speed of all classes of vehicle, not just the maximum speed of vehicles on roads, and (ii) remove the necessity for Secretary of State authorisation for signage. This would provide greater clarity and accountability for this issue in Scotland and greater certainty over the ability of Scottish Ministers to make unfettered use of these new powers.

Section 23 Implementation of international obligations

This provision did not result from a recommendation of the Commission.

Scottish Ministers are responsible for implementing European Community law and international obligations in relation to devolved areas in Scotland. UK Ministers generally cannot act where a function has been transferred to Scottish Ministers, but an exception to this allows UK Ministers to act concurrently with Scottish Ministers in relation to the implementation of Community obligations, as there may be circumstances in which UK-wide implementation is more convenient.

The provisions in the Bill would broaden this exception, allowing UK Ministers to act concurrently with Scottish Ministers to implement international obligations on a UK basis in circumstances where UK-wide implementation is considered to be more convenient. Scottish Ministers will thus no longer have exclusive functions in the implementation of international obligations.

The Scottish Government has significant doubts about the wider practical use or relevance of the new powers. The UK Government already has powers, under sections 35 and 58 of the Scotland Act, to enforce compliance with international obligations. Community law and convention rights are excluded from the definition of “international obligations” for the purposes of the existing section 126 (10) of the Scotland Act because it was thought that compliance would be adequately enforced by sections 29(2), 53 and 57.

The approach in the Bill would effectively provide UK Ministers with a substantial area of executive authority over devolved matters which would be exercisable without reference to or approval of the Scottish Parliament. The Government believes that considerable evidence would be required in support of such a proposal.

The Scottish Government does not support this provision and invites the Parliament to consider the arguments for, and the effect of, the proposal.

Part 3 – Finance

Introductory

The following section represents the Government's initial analysis of and response to the UK Government's proposals for reform of the system of devolved funding for Scotland. The Government will provide detailed comments to both the Parliament and UK Government once it has had the opportunity to fully consider the plans contained in the Bill.

An initial assessment is available at the following location - <http://www.scotland.gov.uk/Topics/Government/Finance/18127/CommSDfinancials>

The proposals do not meet the ambition the Scottish Government has for Scotland. The Bill fails to provide Scotland with any significant new economic or financial levers. Approximately 85 per cent of Scottish revenues would continue to flow to the UK Government. The proposals also pose a considerable risk to future Scottish budgets.

The Government is clear that Scotland needs full financial responsibility to boost our recovery, invest in our public services and support long-term sustainable growth.

However, the Government welcomes the UK Government's commitment to work collaboratively with the Scottish Government and Parliament to ensure that any changes operate effectively. The Scottish Government will participate fully in that process.

Sections 26 and 27 Scottish rate of income tax

The draft provisions would abolish the SVR and provide a mechanism to reduce the basic, higher and additional rates of income tax in Scotland by 10p, with a commensurate reduction in the Scottish block grant. The Scottish Parliament would then set a Scottish rate of income tax which would be restricted to be set uniformly across all tax bands to raise additional revenue.

The Bill would not provide Scotland with a share of receipts from income tax on savings and dividends, as proposed by the Commission.

The main features of the income tax proposal are as follows:

- SVR would be abolished
- The Scottish Parliament will be required, each year, to pass a resolution to levy a new Scottish income tax rate. It is understood that the rate will need to be formally communicated by the end of December. It is claimed that this will be necessary to enable HMRC sufficient time to collect Scottish tax revenues for the start of the next tax year. This is however, not specified in the legislation.
- The Scottish Parliament will be able to set the Scottish rate in amounts of half pence or whole pence.

- The Scottish rate of income tax will apply to every UK resident tax payer who is defined as a Scottish tax payer. The starting point will be the definition for the SVR, but this will be updated and revised.
- The proposals will be introduced in April 2016. However, there will be a transitional period. The UK Government expects this period to last for two or three years. It could therefore take until April 2019 for the proposals to be fully implemented.
- The amount paid to the Scottish Government from income tax would be based on forecasts prepared by the Office for Budgetary Responsibility. The forecasts would be reconciled with actual receipts up to 12 months after the end of the relevant financial year.
- Only HMRC would collect income tax in Scotland.

These provisions do not address the well documented concerns with the income tax proposals raised by the Scottish Government and numerous other commentators. Analysis by the Scottish Government suggests had the Scotland Bill's proposals been in place since Devolution in 1999, the cumulative devolved budget between 1999/00 and 2010/11 would have been £8 billion lower in real terms than under the current Devolution framework.

Sections 24, 28 – 31 Other taxes

The Bill provides for the devolution of Stamp Duty Land Tax (SDLT) and Landfill Tax. In contrast to Scottish income tax, these would be devolved to the Scottish Parliament, and become “devolved taxes” in the terms of the Bill. Devolution would include collection and management, providing flexibility on how to administer these taxes (for example, to enter into an agency arrangement with HMRC or to look at other ways to collect the taxes).

SDLT would be devolved in broad terms, allowing flexibility for Scotland to consider reform of the tax on land transactions. Similar flexibility would be provided for tax on disposals to landfill but there is no flexibility to look at the taxation of waste disposal more generally.

The Bill would disapply the existing UK SDLT and Landfill Tax regimes in Scotland. It would be crucial that a workable transitional regime is put in place to avoid the risk of a gap where no tax is levied on these activities in Scotland.

The Bill would introduce the concept of a “devolved tax” with SDLT and Landfill Tax being the first devolved taxes. Provisions in the Bill would allow more taxes to be made “devolved taxes” by Order in Council approved by both the Westminster and Holyrood Parliaments.

The Scottish Government welcomes the devolution of Landfill Tax and Stamp Duty Land Tax, and the introduction of the legislative concept of “devolved taxes” (which can be added to by agreement of the two Parliaments).

The Bill would not devolve Air Passenger Duty (APD) and Aggregates Levy, as recommended by the Commission. To support its approach the UK Government relies on a planned review of APD and current EU litigation brought by the British Aggregates Association in relation to Aggregates Levy. The Scottish Government does not consider these to be substantive barriers to devolving responsibility for these taxes in this Bill, particularly given that the other financial provisions are not scheduled to be devolved until 2015 or 2016 at the earliest. If these taxes were devolved, it would simply be for the Scottish Government and Parliament to consider options for future reform or to address the consequences of EU judgements, as is already the case in other areas, and any other devolved policy. The UK Government states that it will consider devolving both taxes in the future but provides no timeline for doing so.

Section 32 Borrowing

Borrowing for capital

The proposals include a specific power for the Scottish Ministers to borrow for “the purpose of meeting capital expenditure”. The main features of that power are as follows-

- ◆ Scottish Ministers would be able to borrow from the National Loans Fund (NLF) and private lenders “such as commercial banks”.
- ◆ Borrowing for capital purposes must be “by way of loan”. The Command Paper explicitly states that the Scottish Government could not issue bonds.
- ◆ There would be a statutory limit on the amount of outstanding debt owed and a limit on the amount which could be borrowed in a given year. The Bill specifies a limit of £2.2 billion on outstanding debt. Borrowing in any given year would be limited to 10% of the Scottish capital budget.
- ◆ The annual and overall limits could be amended by order made by the Secretary of State with HM Treasury consent and with the approval of the House of Commons only
- ◆ The capital borrowing powers will not be fully operational until April 2015. However, from April 2013 capital borrowing will be permitted for specific projects, subject to HM Treasury consent.

The Government welcomes the principle the introduction of a specific power to borrow for capital investment purposes and the flexibility to seek borrowing from the market. However, the regime as proposed is limited and highly controlled by HM Treasury.

The timing of the proposed facility would also not assist in managing the funding pressures arising from the Forth Replacement Crossing. The lack of opportunities to issue bonds severely constrains the flexibility and options for responsible and cost-effective borrowing.

As with other elements of the financial package, a greater formal role for Scottish Ministers and the Scottish Parliament in the regime, especially adjustments to the debt limit, would be desirable.

Borrowing for current revenue purposes

Under the UK Government's income tax proposals, the Scottish Government's budget would be exposed to cyclical volatility. The proposals would not give sufficient levers to mitigate the effects of this volatility.

Under the proposals, the UK Government would 'assign' income tax revenue to the Scottish Government based on forecasts of Scottish tax receipts prepared by the Office for Budgetary Responsibility (OBR). These forecasts would be reconciled with actual receipts up to 12 months after the end of the relevant financial year.

When outturn receipts were less than forecast, the Scottish budget for the following year would be reduced by a corresponding amount. Limited revenue borrowing would be provided to mitigate this volatility. However the Scottish Government would have to absorb the first 0.5% of any deviation, equivalent to £127 million in 2014-15, through cuts in spending.

In addition, there would be a total cap on such borrowing of £500 million and an annual limit of £200 million. This cap is unchanged from the in year borrowing limit permitted in the Scotland Act, despite the increase in volatility the Scottish Government would be exposed to. Furthermore, these limits would have been insufficient to offset the volatility in income tax revenues observed in recent years.

Moreover, if the OBR were to accurately forecast a temporary reduction in revenues, perhaps as a result of a slowdown in the global economy, the Scottish Government could not borrow to offset this effect. In contrast to the UK Government who would be allowed to borrow to maintain public expenditure levels, spending would have to fall in Scotland.

Such borrowing would have to be repaid over four years. This represents a significantly shorter repayment period than available to most other governments and may have to occur on top of more general cuts to public spending.

The revenue borrowing power in the draft provisions is, as with the capital borrowing power, entirely controlled by HM Treasury. HM Treasury would determine repayment terms, interest rates and the calculation of the amount that could be borrowed when tax receipts fail to meet the forecast.

The Scottish Government does not, therefore, believe that the proposals represent an adequate framework to manage the additional risks that the financial proposals represent.

Block grant adjustment and other non-legislative arrangements

Under the proposals, approximately two thirds of the Scottish block grant would continue to be provided through the operation of the Barnett formula. The mechanism for proposing and agreeing this element of the block grant, and for calculating the abatement for forecast income tax receipts, are critical to the operation of the system and the future level of public funding to support expenditure in Scotland. The Command Paper does not set out these issues in detail. It states that "[Current] circumstances make a definitive statement on the correct reduction to the block grant inappropriate at this time".

Strengthening Scotland's Future notes that the methodology for calculating reductions in the block grant is fundamental to the future success of the new financing arrangements. The UK Government have undertaken to consult the Scottish Government on this issue. While the Scottish Government welcomes this commitment, it is crucial that the options for adjustment are properly understood before the legislation proceeds.

The Government also welcomes moves to strengthen inter-Governmental arrangements. Further advice will be provided as the specific proposals are made clear.

Parliament will wish to consider carefully what information it requires on the mechanisms for adjusting the block grant and inter-Governmental liaison in coming to a considered view on the new system of funding being proposed by the UK Government.

Implementation costs

The UK Government's position is that the costs of implementing the new tax system, and any other changes proposed in the Bill, would fall on existing Scottish budgets. The Scottish Government disagrees with this approach. The Statement on Funding Policy, which governs inter-Governmental finance, states at Paragraph 3.2.8:

where decisions taken by any of the devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the United Kingdom Government or, alternatively, decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust for such extra costs, the body whose decision leads to the additional cost will meet that cost

The Scottish Government believes that the decision of the UK Government to introduce changes to the system of funding devolved matters in Scotland would lead to additional costs falling on the Scottish Government, and consequently – consistent with the Statement of Funding Policy – these additional costs should be met by the UK Government.

The UK Government has cited for its view Paragraph 3.2.6 of the Statement of Funding Policy:

the devolved administrations will meet all the operational and capital costs associated with devolution from within their allocated budgets;

The Scottish Government believes that this paragraph clearly refers to existing devolved competence. For example, if the Scottish Parliament were to create a system of licensing or regulation within its current devolved competence then it would have to meet the operational costs of such a system from existing budgets. The principle cannot apply to extensions of devolved competence without being a major inhibition to adjusting the competence of the Scottish Parliament. For example, if a major function in connection with welfare was to be devolved to the Scottish Government, the associated operational and capital budgets would also be expected to be devolved, rather than being met from existing resources. The Scottish Government is encouraged in this view by the approach the DWP is taking to the devolution of Council Tax benefit to local authorities in England (Paragraph 37, Page 21, *Universal Credit: welfare that works*):

While the aim is for a more cost effective system overall, any new administrative burdens on Local Authorities will, as a matter of principle, be funded by the Department for Work and Pensions in the usual way.

The Scottish Government also observes that the proposals on income tax do not actually devolve the tax. The Scottish Parliament has the responsibility to set a tax rate, but the tax itself, and all its associated elements such as bands and thresholds and the administrative arrangements for collecting it, remain reserved.

The UK Government has prepared indicative costings of the cost of implementing the Scotland Bill's financial provisions. These are contained in the accompanying Regulatory Impact Assessment. The Bill contains a clause which would give Scottish Ministers a power to reimburse a UK Minister or UK department for the administrative expenses of the income tax regime. This provision, which replicates an existing provision for the SVR, does not bear on the arrangements for the attribution between governments' budgets of the costs of implementation discussed above.

Part 4 – Miscellaneous and General

Miscellaneous

Section 33 Maximum penalties which may be specified in subordinate legislation

This provision did not result from a recommendation of the Commission.

Currently an order under the Scotland Act can create a penalty of up to two years imprisonment for conviction on indictment, but can only allow the summary courts to impose a penalty of up to three months imprisonment (or a level 5 fine).

This is now inconsistent with the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The Act increased the maximum period of imprisonment for summary convictions in “either way” offences (that is, those that can be tried either summarily in the District Courts or Sheriff Courts or on indictment in the High Court of Justiciary or Sheriff Court) to twelve months.

Section 33 would amend section 113(10) of the Scotland Act to allow the creation of new offences which attract sentences of up to twelve months imprisonment, thus bringing the limits for summary conviction in line with the criminal penalties established in the Criminal Proceedings etc (Reform) (Scotland) Act. A power would be provided to allow such penalties to be revised in line with future changes in the standard tariff for offences in Scotland. As such this is a technical but nonetheless worthwhile adjustment to the provisions of the existing Scotland Act.

The enabling power to make further changes would be subject to affirmative procedure in the Scottish Parliament and Westminster, so it would not allow the UK Government to make unilateral changes to this aspect of Scots criminal law.

The Scottish Government supports this provision.

RECOMMENDATIONS NOT IN THE SCOTLAND BILL

General

The Commission on Scottish Devolution made a number of recommendations that are not included in the Bill, either because they would not require legislation, or because the UK Government has decided not to implement them legislatively, although that would have been an option. The Scottish Government regrets that some of the latter recommendations are not included in the Bill. These are discussed in the first section below. The second section discusses recommendations of the Commission that would not require legislation, in the light of the UK Government's plans in the paper *Strengthening Scotland's Future*. The UK Government has decided not to proceed with recommendations of the Commission that would have reserved, or effectively reserved, food content and labelling and aspects of charities law. The Scottish Government welcomes that approach, for the reasons described in the third section below.

The Scottish Government invites Parliament to consider the UK Government's proposed approach to the Commission recommendations not included in the Bill, particularly those that could be included in legislation.

Potential legislative proposals

Welfare

The Commission made several recommendations on welfare which were amongst its most important proposals. These were:

- 5.19: There should be scope for Scottish Ministers, with the agreement of the Scottish Parliament, to propose changes to the Housing Benefit and Council Tax Benefit systems (as they apply in Scotland) when these are connected to devolved policy changes, and for the UK Government – if it agrees – to make those changes by suitable regulation.
- 5.20: A formal consultation role should be built into DWP's commissioning process for those welfare to work programmes that are based in, or extend to, Scotland so that the views of the Scottish Government on particular skills or other needs that require to be addressed in Scotland are properly taken into account
- 5.21: The Deprived Areas Fund should be devolved to the Scottish Parliament given the geographic nature of the help it is designed to provide and the fit with the Scottish Government's wider responsibilities.
- 5.23: As part of its considerations as to future reform of the Social Fund, the UK Government should explore devolving the discretionary elements of the Fund to the Scottish Parliament.
- 5.24: The interpretation provision in relation to 'social security purposes' in the Scotland Act should be amended to make it clear that the reservation refers to social security purposes related to the type of provision provided by the UK Department for Work and Pensions.

The Scottish Government has welcomed these recommendations (with the exception of 5.24, which is unnecessary as there have been no difficulties with the wording in practice). However, the UK Government's view is that its welfare reform programme has generally superseded the Commission's recommendations. The UK Government has therefore elected not to take forward the recommendations in the Scotland Bill.

The package of welfare recommendations formed one of the most significant parts of the Commission's report. The spirit of the recommendations captured three key principles:

- A formal role for the Scottish Government and Scottish Parliament in the development of DWP benefits policy as it impacts on devolved areas
- A formal role for the Scottish Government and Parliament in the operational design and delivery of DWP programmes that impact on devolved areas
- Devolution of certain welfare benefits

A formal role for the Scottish Government in DWP decision-making would help maximise the potential of DWP funding in Scotland, as DWP programmes increasingly impact on a wide variety of services funded by the Scottish Government – including skills/training, health-related services, regeneration and childcare. The Scottish Government believes the principle of a formally enshrined consultation role to be extremely important, and invites Parliament to consider how this might be implemented, including the possibility of legislation in the Scotland Bill.

Devolution of the Deprived Areas Fund would have enabled Scottish cities to plan in a more strategic fashion, thus helping more people into work in Scotland in this difficult economic climate. Devolution of discretionary aspects of the Social Fund would enable this funding to be better aligned with Scottish priorities. These are examples of measures whereby services funded by DWP could be enhanced through increased levels of devolution. However, the Deprived Areas Fund is to come to an end in March 2011.. The UK Government has announced plans to devolve the discretionary aspects of the Social Fund to local authorities in England, and that the devolved administrations will determine the most appropriate arrangements for Scotland and Wales. According to *Strengthening Scotland's Future*, the UK Government intends to reform and devolve to Scotland and Wales two discretionary elements of the Social Fund: Community Care Grants and Crisis Loans. Further details of these proposals are yet to be announced, and the Scottish Government invites Parliament to consider how this might be implemented, including the possibility of legislation in the Scotland Bill.

The recommendation that Scottish Ministers, with the agreement of the Scottish Parliament, could propose changes to the Housing Benefit system as it applies to Scotland could have provided a useful mechanism to recognise Scottish interests in Housing Benefit, and take account of particular Scottish housing circumstances. *Strengthening Scotland's Future* says that Housing Benefit will be subsumed within the new Universal Credit, and the UK Government does not feel it would be appropriate for the Scottish Government to have a right to request different levels to be set in Scotland. The UK Government's response has not taken account of the reason for the Commission's recommendation, which was the interaction between benefits policy and devolved policy, and the legitimate interest of the Scottish Government and Scottish Parliament in developing benefits policy to take account of devolved policy in related areas:

5.230 Whether these benefits remain reserved, as we have concluded, or are devolved, it is clear that the overlapping responsibilities of the UK and Scottish Governments and Parliaments will mean that this is an area where coordination and joint working will be needed. If they remain reserved then, given the close links between these benefits and devolved responsibilities, there should be more

scope for them to be adjusted to deal with changes in those areas. That will mean that there should be greater scope than there is now for Scottish variation in these policy areas, in line with the scope for variation in the devolved policy areas to which they are connected.,

The Scottish Government supports this conclusion which remains relevant even after the introduction of Universal Credit.

The recommendation that Scottish Ministers - again, with the agreement of the Scottish Parliament – could have proposed changes to the Council Tax Benefits system as it applies to Scotland was welcomed by the Scottish Government. In its white paper on benefit reform – *Universal Credit: benefit that works* – the UK Government has described its plans to replace Council Tax Benefit (which will not form part of the new Universal Credit) with local schemes designed and administered by local authorities. This would allow councils to devise their own schemes tailored to local needs. The Government has not yet seen any detail of how the scheme would work. *Strengthening Scotland's Future* says that the UK Government will review the existing powers of local authorities; and will work with local authorities in Scotland, and with the Scottish Government, to give effect to necessary changes to Council Tax Benefit. The Scottish Government will support with the UK Government in developing its proposals further.

While the Scottish Government welcomes the prospect of devolution of Council Tax Benefit and discretionary elements of the Social Fund, it is concerned at the UK Government's plans for the Commission's other recommendations: in particular there is no specific commitment to a formal role for the Scottish Government in the Work Programme ; and no proposals for a formal role for either the Scottish Government or the Scottish Parliament in developing DWP benefits policy to recognise the link with devolved policy. These recommendations recognised the interests of the Scottish Government and Parliament in reserved benefit policy, and together formed a key component of the Commission's recommendations. The Scottish Government regrets that the recommendations are not addressed in the UK Government's legislative proposals, and invites Parliament to consider whether provision for these areas should be included in the Scotland Bill.

Marine environment

The Commission made the following recommendation on the marine environment:

“The effectiveness of the agreement [on marine planning] reached by the UK and Scottish Governments should be kept under review by the inter-governmental machinery, and nature conservation should be devolved to the Scottish Parliament at the earliest appropriate opportunity, taking into account the experience and evidence to be gained from the operation of the regime set out in the respective Marine Bills.”

The Scotland Bill would provide an opportunity to devolve legislative competence over marine nature conservation to the Scottish Parliament, and was welcomed by the Scottish Government. However, the UK Government has chosen not to implement this recommendation, and committed only to keeping current arrangement under review, and to consider further devolution of powers to Scotland once it has assessed, in conjunction with the devolved administrations, the effectiveness of the arrangements currently in place.

There is a strong case for devolution of marine nature conservation in the Bill:

- ◆ The executive devolution process put in place by the UK Marine and Coastal Access Act is complex, involving UK Ministerial approval at key stages. This is complicated and unnecessary. The geography under the Act is also complicated, with different procedural rules applying to different parts of the sea. For example, the 12 miles around Rockall, St Kilda and the Flannan Isles are fully devolved for marine planning and nature conservation, but the sea in between is not.
- ◆ The key interface is that between fisheries and marine nature conservation, and to have complicated differences in managing this interface sensibly is neither efficient nor effective.
- ◆ Full devolution is a longstanding request from Scottish interests such as Environment Link.
- ◆ The Scottish Parliament has supported further devolution in this area, agreeing *“that Scotland should have responsibility out to 200 nautical miles as part of the Scottish zone for marine spatial planning, fisheries and marine nature conservation including the network of marine protected areas”*. (S3M-1602 passed on 20 March 2008 without opposition).

The Scottish Government therefore disagrees strongly with the UK Government's proposals on marine nature conservation, and invites Parliament to consider recommending that this is included in the Scotland Bill.

Aggregates Levy

The Aggregates Levy is a tax on the commercial extraction of sand, rock and gravel in the UK. The Scottish figure for 2008-09 was estimated at £53 million. The Commission recommended that this tax should be devolved to the Scottish Parliament. However, the UK Government has chosen not to propose measures to implement this recommendation.

The UK Government's rationale for this decision is that it would not be practical to devolve Aggregates Levy while the EU litigation brought by the British Aggregates Association in relation to the Levy is ongoing. The Scottish Government does not consider this to be a substantive barrier to devolving responsibility for this tax, and neither, presumably, did the Commission, as the litigation was already in progress when they made their recommendation. If Aggregates Levy were devolved, it would simply be for the Scottish Government and Parliament to address the consequences of EU judgements, as is already the case in other areas. The Scottish Government would support the devolution of Aggregates Levy, and invites Parliament to consider recommending that this is included in the Scotland Bill.

Air Passenger Duty

The Commission recommended that Air Passenger Duty (APD) should be devolved to the Scottish Parliament. The Scottish APD figure for 2008-09 was estimated at £154 million, based on population share. With increases to APD rates this is expected to increase to £193 million in 2010-11 and to £243 million in 2011-12. However, the UK Government has chosen not to fulfill the recommendation to devolve APD. The rationale

for this is that the UK Government's Coalition Agreement commits it to consider replacing Air Passenger Duty with a per-plane tax, and that it would be impractical to devolve APD while these considerations were ongoing. The Scottish Government does not consider this to be a barrier to devolving responsibility for APD. If the tax were devolved, it would be for the Scottish Government and Scottish Parliament to consider options for future reform, as is already the case in other devolved areas, rather than adopting the UK Government's plans. The Scottish Government would support the devolution of APD, and invites Parliament to consider recommending that this is included in the Scotland Bill.

Immigration

The Commission on Scottish Devolution recommended that, while immigration should remain reserved, "active consideration (supported by inter-governmental machinery) should be given to agreeing sustainable local variations to reflect the particular skills and demographic needs of Scotland". The UK Government does not propose to legislate on this.

The UK Government has recently announced its plans to cap non-EEA economic migration at 21,700 skilled workers. This cap would disadvantage Scotland economically. The population of Scotland is expected to age more rapidly than that of the rest of the UK, while the growth rate of the working age population is projected to be considerably lower in Scotland over the next 25 years. In order to achieve the population growth necessary to boost Scotland's economic performance (as set out in the Government Economic Strategy), the population of Scotland needs to grow by approximately 23,000-24,000 per annum until 2017. The chief contribution to this (17,000 to 18,000) would normally be expected to come from net migration. It is currently estimated that around half of migrants to Scotland come from outside the EEA.

Migration has had a positive impact on Scotland. There is cross-party support for the Fresh Talent Initiative, which recognises the need for Scotland to attract talented people to live, learn, work and remain .

The Scottish Government has made the case to the UK Government for the annual limit on economic migration to allow for regional flexibility for Scotland. A "Scotland Skilled Workers Flexibility" would provide Scotland with a distinct annual allowance in relation to Tier 2 migration (Tier 2 migrants are skilled workers who have a confirmed offer of employment with a company based in the UK). The requirements of the Resident Labour Market Test and Shortage Occupation List mean that Tier 2 migrants to Scotland would not be displacing the resident labour force.

Furthermore, the requirement for Tier 2 migrants to be sponsored by an employer could be used to keep migrants within Scotland, preventing individuals from using Scotland as a "back door" into England.

Key bodies such as NHS Scotland, Institute of Directors Scotland, Scottish Trades Union Congress, the Scottish Social Services Council, Scottish Chambers of Commerce, Federation of Small Businesses Scotland, Universities Scotland and the Convention of Scottish Local Authorities are supportive of a flexible approach to the annual limit in Scotland.

Given the strength of the case for a “Scotland Skilled Workers Flexibility”, and given that such flexibility would have been in keeping with the Commission’s recommendation, the Scottish Government regrets that the UK Government is not proceeding with this, and invites Parliament to consider recommending that this is included in the Scotland Bill.

Recommendations not requiring legislation

Health and Safety Executive

The Commission recommended the development of a closer relationship between the Health and Safety Executive in Scotland and the Scottish Parliament, as devolved and reserved powers interact closely in this area. This does not require legislation, and *Strengthening Scotland’s Future* acknowledges that the Scottish Government and Scottish Parliament already work closely and effectively together with the Health and Safety Executive.

The Scottish Government also notes that groups such as the Partnership on Health and Safety in Scotland (PHASS) and the National Advisory and Advocacy Group for Healthy Working Lives have created good working relationships between health and safety bodies and the devolved institutions. However, the Commission recognised that there is no reason in principle not to devolve health and safety, and the Scottish Government shares that conclusion.

Statutory obligations towards the children of asylum seekers

The Commission recognised the potential conflict between the Home Office’s responsibilities for asylum and deportation and the statutory duties of local authorities in Scotland to look after the interests of children, as well as the Scottish Government’s responsibility for public well-being. To address this reserved/devolved tension, the Commission’s final report recommended that, when dealing with the children of asylum seekers, the UK authorities must recognise the statutory responsibilities of Scottish authorities for the well-being of children in Scotland.

Since January 2009 all UK Borders Agency staff and contractors have been operating under a statutory Code of Practice to keep children safe from harm. When children are detained at Dungavel, an agreement exists between the UKBA and South Lanarkshire Council to ensure that children are given all the help and support they need.

While this is encouraging, the Scottish Government remains fundamentally opposed to dawn raids and the detention of children, and is concerned about the treatment of children subject to immigration controls (i.e. when they are detained by UKBA prior to removal from the UK). While the Government will continue to raise concerns with UKBA about the need to promote the well-being of children at all times, it is generally content with the commitment of Scottish and UK authorities to work together to ensure that Scotland’s statutory obligations towards the children of asylum seekers are respected.

Research Councils UK

The Commission recommended that “*Research Councils UK should re-examine its approach to funding so that Scottish institutions delivering a comparable function to institutions elsewhere in the UK have access to the same sources of research funding,*

with the aim of ensuring that the effective framework for research that has been established across the UK is not jeopardised’.

The Scottish Government supported this recommendation. Research Councils UK is funded by the Department for Business, Innovation and Skills, and provides research grants to higher education institutes in the UK. Research Councils UK’s eligibility criteria disadvantages those Scottish research institutions which are considered to be Government-supported research organisations (rather than higher education institutions or independent research organisations), and are therefore ineligible for funding from Research Councils UK. The organisations include the Macaulay Land Use Research Institute (MLURI); the Moredun Research Institute (MRI) and the Scottish Crop Research Institute (SCRI).

In order to obtain access to Research Council funding for MLURI, MRI and SCRI, the Scottish Government has entered into specific co-funding initiatives with individual research councils in areas of particular importance to Scotland (for example, food security) where the expertise in Scotland is recognised by Research Councils as enriching and enhancing a specific research area. The increasing alignment of the Scottish Government’s own research programmes with those at the UK level should generate additional opportunities for co-funding. However, co-funding initiatives have relatively high administrative costs.

In view of this, and of the changing landscape of research institutions within the UK, it would be timely – and potentially cost-effective - to re-examine the approach to funding that Research Councils UK adopts towards Scottish institutions delivering a comparable function to institutions elsewhere in the UK. The Scottish Government therefore welcomed the recommendation as an opportunity to secure better value for money. Parliament is invited to consider the UK Government’s approach to this recommendation.

Animal health

The Commission recommended that funding for policy relating to animal health should be devolved whilst responsibility for funding exotic disease outbreaks should be retained at a UK level. The UK Government has accepted this recommendation and, in conjunction with DEFRA and the Scottish Government, is working towards delivering budget responsibility by April 2011. The recommendation will therefore be implemented but will not form part of the Scotland Bill.

The Scottish Government supports the proposal to devolve funding for policy relating to animal health. At present policy on animal health, including response to exotic disease outbreaks, is devolved, but the budgets are held by the UK Government.

Proposed reservations not in the Bill

Charities

The Commission recommended that the definitions of “charity” and “charitable purpose” should be standardised across the UK, and that charities registered in one part of the UK should not have to register separately in another part in order to conduct their activities there. The UK Government has opted not to legislate on these recommendations, a decision which is welcomed by the Scottish Government. The

discrepancies arose when the UK Government opted to use different definitions in its Charities Act 2006 – the original intention had been for that Act and the Charities and Trustee Investment (Scotland) Act 2005 to use the same wording. Implementing the change of definitions as proposed by the Commission would therefore diminish the terms of the devolution settlement by allowing Westminster to amend definitions which represent the will of the Scottish Parliament. Altering definitions could also cause uncertainty for Scottish charities.

While in favour of minimising the administrative burden on charities, the Scottish Government recognises the importance of providing the public with access to accurate information on all charities operating in Scotland, and entry on the Scottish Charity Register is an effective way of delivering this. The Government was therefore opposed to the recommendation to remove the requirement for charities active in Scotland, but registered elsewhere in the UK, to register in Scotland.

Strengthening Scotland's Future states that the UK Government intends to revisit the Commission's recommendations during its upcoming review of the Charities Act 2006. Given that the Act applies only to England and Wales, the Scottish Government does not think this is an appropriate forum to consider these cross-border issues. The Government would remain opposed to any revival of the Commission's recommendations, or other proposals to the same effect. The Government invites the Parliament to note the position on charities.

Food content and labelling

The UK Government had previously indicated its intention to re-reserve food content and labelling, in line with a recommendation made by the Commission. The Commission felt that the potential for the Scottish Parliament to legislate differently on food content and labelling could be problematic for the UK single market. However, *Strengthening Scotland's Future* recognises that, as most of the law on food content and labelling is decided at European level as part of the Single European Market, the potential for the Scottish Parliament to legislate in a damagingly different way is very limited.

The Scottish Government has consistently voiced its opposition to the reservation of food content and labelling, which would be unnecessary, and inappropriate given the links to health policy, which is an almost entirely devolved matter. The Scottish Government welcomes the decision not to reserve food content and labelling.